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In the Matter of	)	
	)	
Implementation of the Pay Telephone	)	CC Docket No. 96-128
Reclassification and Compensation	)	
Provisions of the Telecommunications	)	
Act of 1996	)	
	)	
Florida Public Telecommunications	)	
Association, Petition for a Declaratory	)	
Ruling and for an Order of Preemption	)	
Concerning the Refund of Payphone	)	
Line Rate Charges	)	
	)	

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February 28, 2006

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

_____	)	
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	)	
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_____	)	

**COMMENTS OF THE  
AMERICAN PUBLIC COMMUNICATIONS COUNCIL  
ON THE FLORIDA PUBLIC TELECOMMUNICATIONS ASSOCIATION'S  
PETITION FOR DECLARATORY RULING**

Pursuant to the Commission's Public Notice dated February 8, 2006, the American Public Communications Council ("APCC") hereby files comments in support of the Florida Public Telecommunications Association's ("FPTA's") request for a declaratory ruling. FPTA requests that the Commission (1) declare that BellSouth Telecommunications, Inc.'s assessment of end user common line charges in addition to unadjusted local payphone line charges on Florida payphone service providers ("PSPs") from April 15, 1997, until November 10, 2003, was inconsistent with Section 276 of the

Communications Act, 47 U.S.C. § 276, and the Commission's *Payphone Orders*;<sup>1</sup> and (2) require BellSouth to refund to the relevant PSPs the amounts collected during that period in excess of cost-based charges.<sup>2</sup>

The fundamental issue raised by FPTA's petition is the same as that raised by the petitions of the Illinois Public Telecommunications Association ("IPTA"), Southern Public Communications Association, and Independent Payphone Association of New York,<sup>3</sup> on which APCC previously filed comments.<sup>4</sup> We will not repeat all the

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<sup>1</sup> *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 20541 (1996) ("*First Payphone Order*"), recon. 11 FCC Rcd 21233 (1996) ("*First Payphone Reconsideration Order*"), *aff'd in part and rev'd in part*, *Ill. Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997), *cert denied*, *Virginia State Corp. Comm'n v. FCC*, 523 U.S. 1046 (1998); Order, 12 FCC Rcd 20997 (CCB 1997) ("*First Waiver Order*"); Order, 12 FCC Rcd 21370 (CCB 1997) ("*Second Waiver Order*") (collectively, the "*Payphone Orders*").

<sup>2</sup> Petition of the Florida Public Telecommunications Association, Inc., for a Declaratory Ruling and for an Order of Preemption at 2 (filed January 31, 2006) ("FPTA Petition").

<sup>3</sup> Illinois Public Telecommunications Association's Petition for Declaratory Ruling (filed July 30, 2004) ("IPTA Petition"); Southern Public Communication Association Petition for a Declaratory Ruling (filed November 9, 2004) ("SPCA Petition"); Petition of the Independent Payphone Association of New York, Inc., for an Order of Preemption and Declaratory Ruling (filed December 29, 2004) ("IPANY Petition").

<sup>4</sup> See Comments of the American Public Communications Council on the Illinois Public Telecommunications Association's Petition for Declaratory Ruling (filed August 26, 2004); Comments of the American Public Communications Council on the Southern Public Communication Association's Petition for a Declaratory Ruling (filed December 10, 2004); Comments of the American Public Communications Council on the Petition of the Independent Payphone Association of New York, Inc., for an Order of Preemption and Declaratory Ruling (filed January 18, 2005). Each of these previously filed comments are hereby incorporated by reference into APCC's instant comments.

arguments in APCC's prior comments, which are in large part also applicable to FPTA's petition. It is significant, however, that in Florida, BellSouth has effectively admitted that its past rates violated the NST by reducing its rates in an amount equal to the amount of the federal end user common line charge. FPTA Petition at 8. Thus, BellSouth's prior rates in Florida clearly violated the *Payphone Orders* and FPTA members are entitled to a refund at least equal to the amount of the federal end user common line charge.

As the fourth NST refund petition submitted to the Commission in the last 19 months, the FPTA Petition highlights the critical need for a prompt Commission ruling on the NST refund issue. For the reasons stated below, the Commission must not delay a ruling any longer.

#### **I. A TIMELY COMMISSION RULING WILL END REGULATORY UNCERTAINTY**

A Commission ruling on this matter is urgently needed to end regulatory uncertainty,<sup>5</sup> promote uniform application of federal law and help resolve pending state proceedings. Currently, courts in five states and public service commissions in three states are considering the refund issue. One state commission, Oregon, is holding proceedings in abeyance and has written the Chairman to request Commission guidance on the correct interpretation of the Commission's rulings. In addition, the

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<sup>5</sup> See *Vonage Holdings Corporation, Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, WC Dkt. No. 03-211, FCC 04-267 ¶14 n. 46 (rel. November 12, 2004)(finding it "essential that we take action to bring some greater measure of certainty to the industry [and] to enable this Commission and the states . . . to address the numerous other unresolved issues").

refund issue is pending in a case before the U.S. Ninth Circuit court of appeals involving 11 states in Qwest's service territory.<sup>6</sup>

These pending proceedings raise common issues of federal law that should be resolved by the Commission. To date, at least six state commissions and two state courts have ruled in favor of refunds, while at least seven state commissions and two state courts have ruled against refunds. Most of the state rulings have been issued in the last few years. *APCC Ex Parte*. With the states about evenly split on the refund issue, it is clear that some states have interpreted the *Payphone Orders* incorrectly. Federal agencies need not defer to erroneous state agency or court decisions on matters of federal law. Without a federal ruling, the states will continue to inconsistently interpret and apply the FCC's rules and orders.

A timely Commission ruling issued before final rulings in those cases would ensure that the pending cases are resolved consistently and correctly. In 2002, after state commissions had adopted disparate interpretations of the NST, the Commission issued a ruling that clarified the meaning and application of the NST in order to "assist states in applying the [NST] to BOCs' intrastate payphone line rates."<sup>7</sup> After the Commission issued the 2002 order, many states ordered (or approved settlements for)

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<sup>6</sup> See Letter to Daniel Gonzalez from Robert Aldrich, on behalf of APCC, and enclosures (December 23, 2005) ("*APCC Ex Parte*").

<sup>7</sup> *Wisconsin Public Service Commission, Order Directing Filings*, Order, 15 FCC Rcd 9978 (Com. Car. Bur. 2000) ("*NST Designation Order*"), *aff'd in part and modified in part*, Memorandum Opinion and Order, 17 FCC Rcd 2051 (2002) ("*NST Review Order*"), *aff'd New England Pub. Comms. Council v. FCC*, 334 F.3d 69 (D.C. Cir. 2003), *cert denied*, 524 U.S. 2065 (2004)(collectively, the "*NST Orders*").

major reductions in the BOCs' payphone line rates. A timely Commission ruling here will have a similar effect.

## **II. A TIMELY COMMISSION RULING IS NEEDED TO REDRESS INEQUITY AND TO DEFEND THE INTEGRITY OF THE COMMISSION'S PROCESSES**

A timely ruling is also necessary to redress inequity and defend the integrity of the Commission's processes. To secure a waiver enabling them to collect lucrative dial-around compensation revenue, the BOCs pledged to refund payphone line charges in excess of NST-compliant rates. The BOCs have exploited the Commission's processes by first agreeing to bring their payphone line rates into compliance with the new services test so that their payphones become eligible to receive dial-around compensation, and then delaying compliance as long as possible by obstinately maintaining, even in the face of clearcut FCC guidance, that their rates complied with the new services test. The BOCs even challenged this Commission's jurisdiction to order the BOCs to comply with the new services test, even though the BOCs had promised to do just that three years earlier.

As a result, the BOCs have reaped huge economic gains to which they were not entitled, and have unfairly deprived PSPs and their customers of the benefits of cost-based rates, to which PSPs *were* entitled. The Commission should make clear that carriers must deliver when they make promises to the Commission in exchange for regulatory benefits. Allowing the BOCs to keep the excess payphone line charges in the face of their promise to refund those charges would undermine the integrity of the Commission's processes and reward the BOCs for their persistent refusal to comply with the *Payphone Orders*. Requiring refunds, on the other hand, will defend the

integrity of the Commission's processes, make PSPs whole for their losses, and promote the widespread payphone deployment mandate of the Telecommunications Act.

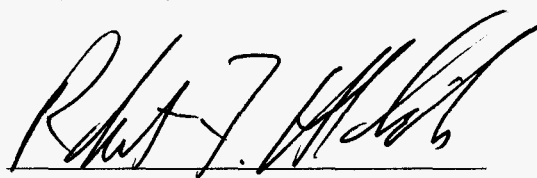
There can be no dispute that the *Payphone Orders* required the BOCs to comply with the new services test in order to be eligible to collect dial-around compensation beginning April 15, 1997, and that the BOCs failed to timely comply with the new services test in Florida as well as numerous other states. The logical and legal remedy for these violations of law is to require the BOCs to refund all charges they have collected since April 15, 1997 in excess of new-services-test-compliant rates. A refund of payphone line charges is clearly preferable to the only alternative – requiring the BOCs to disgorge all dial-around compensation collected while the BOCs were ineligible.

## CONCLUSION

For the foregoing reasons, the Commission should grant the pending petitions for a declaratory ruling and rule that BOCs must provide refunds back to April 15, 1997 for all payphone line charges collected from PSPs in excess of new-services-test-compliant rates.

Dated: February 28, 2006

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert F. Aldrich", written over a horizontal line.

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## CERTIFICATE OF SERVICE

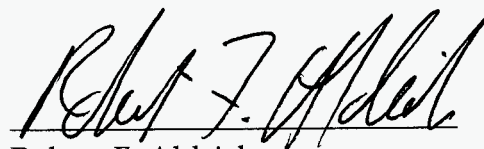
I hereby certify that on February 28, 2006, the foregoing Comments of the American Public Communications Council on FPTA's Petition for Declaratory Ruling was delivered via first-class U.S. Mail, postage pre-paid (or e-mail where noted) to the following:

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